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Supreme Court, U.S.
FILED

No. 95-1359 DEC 12 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARK MARYBOY,
an enrolled member of the Navajo tribe,
Petitioner,

v.

UTAH STATE TAX COMMISSION, et al.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

PETITION FOR WRIT OF CERTIORARI

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December 12, 1995

QUESTION PRESENTED FOR REVIEW

Whether the Utah Supreme Court's holding that the State of Utah has the power to infringe the sovereignty of the Navajo Nation by taxing the income of petitioner (an enrolled member of the Navajo Tribe) earned through employment activities conducted on the Navajo Reservation, solely because his employer is a state subdivision and his position elected, conflicts with prior decisions from this Court, as well as laws and treaties of the United States, so as to require reversal.

PARTIES TO THE PROCEEDING

The following were named respondents to this action below:

The State of Utah

Utah State Tax Commission

Auditing Division of the Utah State Tax Commission

The following were named petitioners to this action below:

Mark Maryboy

Roselyn Maryboy

The following appeared as amicus curiae below:

The Navajo Nation

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

--ooOoo--

MARK MARYBOY, an enrolled
member of the Navajo Tribe,

Petitioner,

-vs-

UTAH STATE TAX COMMISSION,
AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,
and THE STATE OF UTAH,

Respondents.

Mark Maryboy hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Utah in this case.

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported at 904 P.2d 662 (Utah 1995) and is included in the

appendix at pages 1 through 26. The opinion of the Utah Tax Commission is not reported and is included in the appendix at pages 27 through 39.

JURISDICTION

The decision of the Supreme Court of Utah appealed from herein was entered on September 14, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Sec. 8, Cl. 3:

> To regulate commerce with foreign Nations, and among the Several States, and among the Indian Tribes;

Enabling Act of July 16, 1894, ch. 138, 28 Statutes at Large 107:

> That the delegates to the convention thus elected shall meet at the seat of government of said [Utah] Territory . . . and, after organization, shall declare on behalf of the people of the proposed State that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and State government for said proposed State.
>
> * * *
>
> And said convention shall provide by ordinance irrevocable without the consent of the United States and the people of the state --
>
> * * *
>
> Second: That the people inhabiting said proposed State do agree that they forever disclaim all right and title to . . . all lands lying within said limits owned by or held by any Indian or Indian tribe; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . .

Constitution of Utah, Article III:

> The following ordinance shall be irrevocable without the consent of the United States and the people of this State:
>
> * * *
>
> Second: -- The people inhabiting this State do affirm and declare that they forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Utah Code Ann. Section 59-10-116 (1987):

> A tax is hereby imposed on the state taxable income, as defined in Sections 59-10-111 and 59-10-112, of every nonresident individual in accordance with the schedules in Section 59-10-104, but the individual's Utah tax shall be only the portion of the resident tax so calculated as the individual's federal adjusted gross income received from Utah sources (determined under Section 59-10-117) bears to the individual's

total federal adjusted gross income for the same taxable year.

Utah Code Ann. Section 59-10-117(2)(c) (1987):

For purposes of Subsection (1):

* * *

(c) Salaries, wages, commissions, and compensation for personal services rendered outside the state of Utah shall not be deemed to be derived from Utah sources.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a final decision of the of Utah State Tax Commission, dated March 12, 1993, which determined that the income of the petitioner, an enrolled member of the Navajo Tribe, earned on Navajo reservation land within the borders of Utah is subject to Utah State income tax. That decision was affirmed by the Supreme Court of Utah.

B. Statement of Facts.

The petitioner, Mark Maryboy, is an enrolled member of the Navajo Tribe, a federally-recognized Indian tribe. During the years 1988, 1989 and 1990, petitioner lived in Montezuma Creek, Utah, on the Navajo Reservation. This case arose when the Auditing Division of the Utah State Tax Commission

("Commission") ruled that all of petitioner's income as a San Juan County Commissioner was subject to State income taxation.

During the relevant period, petitioner was employed as a San Juan County Commissioner and a division director of the Utah Navajo Development Council. As a County Commissioner elected by and representing District 3 of San Juan County, Mr. Maryboy is paid by San Juan County. Nearly ninety nine percent (99%) of District 3 is comprised of land within the borders of the Navajo Indian Reservation.

Approximately ninety percent (90%) of the constituents in District 3 are Navajos. Principally, Mr. Maryboy coordinated county programs, such as public safety and natural resources, with the Navajo Nation. As County Commissioner, Mr. Maryboy typically

meets twice a month with the six-individual, local Navajo governments, known as "Chapters", located on the Reservation within District 3.

When Mr. Maryboy is not attending meetings outside of his district, he spends the remainder of his time consulting with his constituents, upon the Reservation. With the exception of two yearly County Commission meetings in Bluff, Utah, the San Juan County seat, Mr. Maryboy is on the Reservation performing County Commission duties. Mr. Maryboy often works in Window Rock, Arizona at tribal headquarters.

The Commission found that for the period in question, Mr. Maryboy spent seventy five percent (75%) of his time per year as a County Commissioner working directly upon, and within the borders of, the

Navajo Reservation, performing his County Commissioner's duties.

REASONS FOR GRANTING THE PETITION

POINT I.

THE UTAH SUPREME COURT'S RULING IS IN CONFLICT WITH THIS COURT'S RULINGS THAT TRIBAL MEMBERS' INCOME EARNED FROM ACTIVITIES CONDUCTED WITHIN RESERVATION BOUNDARIES IS BEYOND THE STATE'S POWER TO TAX

In McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), this Court held that federal preemption and an Indian tribe's rights of self-government prevent a state from extending its power to tax income to reach income earned by tribal members from their activities conducted within the tribe's reservation boundaries. The Utah Supreme Court

disregarded the per se nature of the McClanahan rule and devised a balancing test for itself, citing that because petitioner is an elected county official, state interests outweigh federal interests, and all of his income as a County Commissioner is taxable by the state, regardless of the fact that the great majority of it is earned within reservation borders. This holding of the Utah Supreme Court is contrary to the expressed intent of Congress, which has already balanced the state-versus-federal interests. In Oklahoma Tax Commission v. Chickasaw Nation, ____ U.S. ____, No. 94-771 (June 14, 1995), this Court reemphasized that it employs "instead of a balancing inquiry, 'a more categorical approach[,] absent cession of jurisdiction or other federal statute, permitting it, . . . [such that] a State is without power to tax reservation lands and

reservation Indians.'" Id., Slip. op. at 7. Allowing the Utah Supreme Court's holding to stand would invite each state tax commission and court to undertake individual balancing analyses in cases before them, contrary to this Court's expression of the law. Such a result would violate the plain expression of the Congress and is a clearly erroneous interpretation of federal law, meriting this Court's corrective review.

Until the Utah Supreme Court issued its decision, the law was clear that Native Americans earning income upon reservation lands are exempt from state income tax on that income. This Court, in California v. Cabazon Band of Indians, 480 U.S. 202 (1987), recently explained:

> In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule. In Montana v. Blackfeet Tribe, 471 U.S. 759,

> 85 L. Ed. 2d 753, 105 S. Ct. 2399 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated: "In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." Id. at 765. . . .

480 U.S. at 215 n.17. This Court went on to observe that "[w]e have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak."

Id. "Accordingly," this Court concluded, "it is unnecessary to rebalance these interests in every case."[1]

However, the Utah Supreme Court undertook to "rebalance" the interests in this case and held that, because petitioner is a County Commissioner, the state's interest in taxing his income out-weighs both the questions of federal preemption and tribal autonomy which this Court found so determinative in McClanahan and its progeny. This decision was rendered despite the Navajo Nation's own expressions,

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[1] Yet, the Utah State Tax Commission concluded, without any legal basis whatsoever, that

> Based upon the facts presented, the Tax Commission expressly rejects Petitioners' proposition that the location of where the work is performed, in this case on the reservation to a large degree, dictates the extent the state and/or county can tax its employees.

Appendix, pp. 36-37.

in its amicus brief, of concern that such a decision would impinge upon the tribe's sovereignty interests.

Cabazon expressly reinforced this Court's earlier conclusion in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), that "in the special area of state taxation,"

> absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation. . . .

Cabazon, 480 U.S. at 215 n.17 (quoting Mescalero, 411 U.S. at 148) (emphasis added). Mescalero, in turn, emphasized that the seminal decision in McClanahan v. Arizona State Tax Commission 411 U.S. 164 (1973), "lays to rest any doubt in this respect by holding that such taxation is not permissible absent

congressional consent." 411 U.S. at 148. By its "rebalancing" in this case, the Utah Supreme Court has sought to substitute its own consent, and that of any other state tax commission or court, for the required consent of Congress.

In McClanahan, the State of Arizona attempted to impose its individual income tax upon a Navajo woman who resided within the boundaries of the Navajo Reservation and whose income was earned on the reservation. Recalling the long-standing recognition of Indian immunity against state taxation, this Court observed:

> The principles governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789, . . . This policy was first articulated by this Court 141 years ago when

> Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." Worcester v. Georgia, 6 Pet. 515, 557 8 L.Ed. 483 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries. . . .

411 U.S. at 168 (citations omitted).

The McClanahan decision pointed to the Navajo Treaty of 1868, which gives the Navajo Nation the exclusive occupancy of Reservation land and the right to exclude non-members, and the Arizona Enabling Act, as the sources of both the preemptive effect of federal law and of the Navajo Nation's powers of self-government. Likewise, the Utah Enabling Act, 28 Stat. 107, embodied as a part of the "irrevocable

ordinance" of Article III of the Utah Constitution, provides that Indian lands "shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . ."

Tribal sovereignty is coordinate and co-equal to the control over its territory granted by Congress. This Court has, wisely and long, recognized that tribal self-government means nothing if not the power to govern its own members' activities while on the reservation, secure from interference from the states. As long ago as The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866), the United States Supreme Court had expressly rejected the notion that the states possessed any taxing authority upon Indian reservation lands.

McClanahan likewise soundly rejected Arizona's assertion of jurisdiction over Rosalind McClanahan's individual income, just as it would taxation of tribal land itself:

> Nor is the State's attempted distinction between taxes on land and on income availing. Indeed, it is somewhat surprising that the State adheres to this distinction in light of our decision in Warren Trading Post Co. v. Arizona Tax Comm'n, supra, wherein we invalidated an *income* tax which Arizona had attempted to impose within the Navajo Reservation. However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.

411 U.S. at 180 (emphasis in original).

McClanahan and its progeny authoritatively define the limits of a state's power to tax reservation Indian income -- the reservation boundary. See Cabazon, 480 U.S. at 215 n.17. The per se rule enforcing those limits finds succinct expression in a recent opinion by the United States Court of Appeals for the Ninth Circuit:

> Taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation is not permissible absent congressional consent.

Crow Tribe of Indians v. State of Montana, 819 F.2d 895, 902 (9th Cir. 1987) (citing Cabazon and McClanahan).[2] Accord, County of Yakima v. Confederated

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[2] Accord, Utah State Tax Comm'n, "1989 Utah Individual Income Tax Forms and Instructions--Booklet L," at 6 (Instructions for Line 11) (which the Commission also curiously ignored):

Tribes and Bands of Yakima Nation, 502 U.S. 251 (1992).

The per se test laid down by this Court in McClanahan and the cases which succeeded it, provides a "bright line" between the rights of the state and of the tribe, which the decision of the Utah Supreme Court makes pale and illegible. If not overturned, the Utah Supreme Court's decision in this case will serve as an invitation to the state taxing authorities to reassess all manner and kind of state "interests", dimming the "bright line" of McClanahan to a flickering uncertainty throughout the fifty states and their reservation lands. However it may be presented, in plain language, the decision below

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b. **Indian Income.** An enrolled member of an Indian tribe in Utah who lives and works on the reservation on which he is an enrolled member is exempt from Utah income tax on the reservation income. . . .

sanctions the authority of the state to tax the income of tribal members from activities conducted on the reservation, a result which cannot be harmonized with tribal self-government or the decisions of this Court.

POINT II.

THE UTAH SUPREME COURT'S PERMISSION TO TAX MARK MARYBOY'S RESERVATION-EARNED INCOME IS CONTRARY TO DECISIONS OF THIS COURT AS AN IMPERMISSIBLE INTRUSION ON TRIBAL SOVEREIGNTY

Petitioner is an enrolled member of the Navajo Nation residing within the boundaries of the Navajo Reservation. As such, under all applicable authority, his income earned on the reservation lies beyond the state's power to tax, because state taxation would represent an impermissible intrusion into tribal sovereignty. Conversely, Mescalero is understood to

stand for the proposition that "[i]n the case of 'Indians going beyond reservation boundaries,' however, 'a nondiscriminatory state law' is generally applicable in the absence of 'express federal law to the contrary.'" White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 n.11 (1980) (quoting Mescalero, 411 U.S. at 148-49). This Court reaffirmed these principles as recently as Chickasaw Nation decided earlier this year.

Where a tribal member's income derives from activities conducted both within and outside reservation boundaries, the analysis to be applied is explained in the 1982 edition of Felix S. Cohen's Handbook of Federal Indian Law:

> Where state taxes are applied to Indian activities occurring both on and off a reservation, the usual rules respecting activities affecting two taxing jurisdictions should apply. Thus an Indian residing within a reservation but

> earning some income off the reservation can be taxed to the extent of the off-reservation income, provided that the state bases its income tax on place of earning. . . . In other words, in cases involving Indian activities both on and off reservations, the state tax may be validly imposed to the extent of off-reservation activity.

Felix S. Cohen's Handbook of Federal Indian Law 417 (Rennard Strickland ed. 1982) (emphasis added and footnotes omitted). The Handbook's analysis echoes the careful balancing of state interests and Indian sovereignty interests which this Court has achieved in McClanahan, Mescalero and their progeny -- a balancing which the decision of the Utah Supreme Court ignores.[3]

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[3]For example, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-81 (1976), held that Montana's personal property tax could not validly be applied to motor vehicles owned by tribal members who resided on the reservation, notwithstanding the fact that the vehicles Montana attempted to tax were apparently used both on and off the

Justice Marshall's opinion for the Court in McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), begins by introducing the issue in that case as arising "in the context of Arizona's efforts to impose its personal income tax on a reservation Indian whose entire income derives from reservation

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reservation. In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), this Court addressed Washington's attempt to impose its personal property tax upon "the taxable event [of] the use within the State" of Indian owned vehicles which were used both on and off the reservation. *Id.* at 163 (emphasis in original). Rejecting the application of Washington's tax premised upon the "event" of off-reservation use, the Court rules:

> We do not think *Moe* and *McClanahan* can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, . . . this might be a different case. But it has not done so. . . .

Id. Cf. ROBERT N. CLINTON, ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 529 (3d ed. 1991).

sources." 411 U.S. at 165. Respondents argued below that whether petitioner's income is derived from a reservation "source" should be determined by whether the work done by petitioner is "initiated and administered through offices located off the reservation," or whether petitioner is "paid by [his employer] through its offices located off the reservation," (R. 89), and the like. R. 85-87.[4] Neither this Court nor the Congress have ever sanctioned a "source of income" test to determine taxability of income earned within the borders of the sovereign Indian nation. In McClanahan, this Court did not discuss the identity or situs of the employer at all; nor does McClanahan

[4] Even under this "administrative" theory, counsel for Respondent concedes, e.g., that "[t]he County maintained an office for Mr. Maryboy on the reservation out of which Mr. Maryboy discharged some of his responsibilities," (R. 85). *See also* Exhibit "D" to Brief of Respondent, R. 98-99.

even hint that the nature or location of the employer has any significance as a measure of State power to tax where the incidence of the tax falls upon the reservation Indian employee, not the employer itself. More than once, the McClanahan decision addresses the issue in that case as being "the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation," as one involving "reservation Indians earning their income on the reservation," and as involving the State's lack of power "to reach income generated on reservation lands" -- without any distinction as to the concept of reservation vs. off-reservation "source." 411 U.S. at 168, 176, 181.[5]

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[5] In fact, the reference in *McClanahan* to income derived from sources within the Navajo Reservation appears to have originated in Rosalind McClanahan's own pleadings and appeal papers. *See, Abstract of Record, McClanahan v. State Tax*

The Utah Supreme Court justified its decision that the Petitioner's entire income as a San Juan County Commissioner is subject to state income tax by shifting the analytical focus from the sovereignty interests of the Navajo nation as to the petitioner -- who is a Navajo residing on the Navajo Reservation and performing services there -- to the identity of his employer, a county government. The Utah Supreme Court's decision seeks to rebalance tribal sovereignty and state interests, on the state level, giving only lip service to McClanahan and the subsequent case law that has since elaborated upon McClanahan's principles.

Comm'n of Arizona, Dckt. No. 1 CA-CIV 1316, Court of Appeals, State of Arizona, Division One, at 2-3 (a copy of which is annexed to petitioners' Reply Brief, R. 39-52); Brief for Appellant, *McClanahan v. State Tax Comm'n of Arizona*, Dckt. No. 71-834, United States Supreme Court, dated September 14, 1972 (a copy of which is found at R. 53-80).

The decision of the Utah Supreme Court also ignores pertinent language in McClanahan's companion case, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973):

> [A]bsent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation. . . .

411 U.S. at 148 (emphasis added). This Court reaffirmed the principle thus expressed as recently as California v. Cabazon Band of Indians, 480 U.S. 202, 215 n.17 (1987), and County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251 (1992).

Without exception, other courts and state taxing authorities address the issue in terms of whether

Indians "earn their income within the boundaries of this reservation," or whether the income "was derived from activities conducted outside the boundaries of a reservation." Eno v. Commissioner of Revenue, 1987 WL 19121 (Minn. Tax Ct. 1987); Topash v. Commissioner of Revenue, 291 N.W.2d 679, 680-81 (Minn. 1980); LaRoque v. State, 583 P.2d 1059, 1064 (Mont. 1978) ("situs of the activity is the primary factor in determining whether state taxation jurisdiction exists"); Fox v. Bureau of Revenue, 87 N.M. 261, 531 P.2d 1234 (1975).

The question of situs proves especially material in the case of the Navajo Reservation, as the Court of Appeals for the Ninth Circuit observed in Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (9th Cir. 1979):

In McClanahan, . . . the Supreme Court, in reversing, placed great emphasis upon the terms of the Navajo Treaty of July 15, 1868 saying:

> . . . [I]t cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo Treaty to preclude extension of state law -- including state tax law -- to Indians on the Navajo reservation. . . .
>
> Moreover, since the signing of the Navajo Treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation. . . .

Thus, while the Court in McClanahan, . . . did observe that the Arizona Enabling Act was silent on the

> specific question of tax immunity, still the Congressional intent to maintain the tax-exempt status of reservation Indians is clear in light of the Buck Act [4 U.S.C. § 105 et seq.].

601 F.2d. at 1134 (emphasis added and footnote omitted).

This Court has already rejected an attempt to impose 100% state tax liability upon reservation Indians having contacts both on and off the reservation. For example, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-81 (1976), held that Montana's personal property tax could not validly be applied to motor vehicles owned by tribal members who resided on the reservation, notwithstanding the fact that the vehicles Montana attempted to tax were apparently used both on and off the reservation.

The decision in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134

(1980), addressed the State of Washington's attempt to impose its personal property tax upon "the taxable event [of] the use within the State" of Indian-owned vehicles which were used both on and off the reservation. Id. at 163 (emphasis in original). Rejecting the application of Washington's tax premised upon the "event" of off-reservation use, this Court ruled:

> We do not think Moe and McClanahan can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what Moe held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, . . . this might be a different case. But it has not done so. . . .

Id. (emphasis added). The Colville opinion thus instructs that to survive scrutiny under McClanahan and its progeny, state taxation of Indian activity occurring both on and off the reservation must be

"tailored to the amount of actual off-reservation" activity. The Utah Supreme Court's effort at rebalancing the state's interest based on the identity of the county as a non-reservation "source" of income runs contrary to the teachings of Colville.

Felix S. Cohen's Handbook of Federal Indian Law propounds the correct analysis: "[I]n cases involving Indian activities both on and off reservations, the state tax may be validly imposed to the extent of off-reservation activity." Felix S. Cohen's Handbook of Federal Indian Law 417 (Rennard Strickland ed. 1982) (emphasis added and footnote omitted).

McClanahan and its progeny authoritatively define the limits of a state's power to tax reservation Indian income. See Cabazon, 480 U.S. at 215 n.17. The per se rule enforcing those limits finds succinct expression

in a recent opinion by the United States Court of Appeals for the Ninth Circuit:

> Taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation is not permissible absent congressional consent.

Crow Tribe of Indians v. State of Montana, 819 F.2d 895, 902 (9th Cir. 1987) (citing Cabazon and McClanahan).

In a non-taxation context, the Arizona Court of Appeals recognized that the tribe's sovereignty interest precluded a state court from garnishing wages of tribal members, notwithstanding their employment by the Salt River Project, a political subdivision of the State of Arizona:

> To allow a state court to garnish a tribal member's wages earned on the reservation would thwart the Navajo Tribe's

> authority to not allow garnishments of this sort.

Begay v. Roberts, 807 P.2d 1111, 1116 (Ariz. Ct. App. 1990). The same analysis precludes state taxing authorities from taxing income-earning activities of a tribal member conducted upon the reservation. That result obtained despite the fact that the debt was incurred off-reservation and judgment was obtained in a court with both subject matter and personal jurisdiction. The tribe's sovereign decision not to allow garnishment of wages upon the reservation was honored. In contrast, nothing in the Utah Supreme Court's decision would prevent the garnishment of petitioner's income earned on the reservation because that income was held to be within the state's jurisdiction.

The Utah Supreme Court's decision attempts to carve out an exception to the established principles defining state jurisdiction to tax based upon a nebulous state "interest" in taxing the personal income of elected county officials. In doing so, the decision below shifts the analytical focus from the state's jurisdiction over the taxpayer to the state's relationship to the employer, starting with itself. Such an exception finds no support in the cases decided by this Court. The question of state authority to tax the income of petitioner in this proceeding cannot be divorced from the important policies of federal Indian law underpinning this Court's per se rule. Allowing this exception invites litigation of other exceptions

grounded upon equally nebulous state interests or relationships with employers.[6]

The decision of the Utah Supreme Court strays so far and so abruptly from the precedents laid down by this Court that it demands corrective review.

CONCLUSION

The income petitioner earned on Indian lands is not subject to the Utah individual income tax. The decision of the Utah Supreme Court upholding the ruling of the Tax Commission which taxed such income is clearly contrary to well-established principles of federal law. For these reasons, the petition for a writ of certiorari should be granted.

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[6] In truth, the state's interest in taxing the personal income of an elected official is identical to its interest in taxing other taxpayers' income: raising revenue from sources within its jurisdiction.

Respectfully submitted.

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December 12, 1995 * Counsel of Record

APPENDIX

Copr. (C) West 1995 No claim to orig. U.S. govt. works
904 P.2d 662
(Cite as: 904 P.2d 662)

Mark and Roselyn MARYBOY, Petitioners,

v.

UTAH STATE TAX COMMISSION, Auditing Division of the State Tax Commission, and the State of Utah, Respondents.

No. 930173.

Supreme Court of Utah.
Sept. 14, 1995.

Indian taxpayers brought action against State Tax Commission and others to challenge assessment of income taxes on their earnings as county commissioner and state employee. The Supreme Court, Stewart, Associate C.J., held that: (1) imposition of income taxes on Indian state employee who provided mental health services to Indians on reservation was preempted by federal law; (2) state's interest in imposing income tax on Indian county commissioner was sufficient to overcome presumption against state authority to impose tax on Indians; and (3) tax commissioner's order requiring taxpayers to deposit deficiency of income taxes as prerequisite to filing tax appeal did not violate their constitutional right to have open access to courts.

Affirmed in part; reversed in part.

Howe, J., concurred in part, dissented in part, and filed statement.

[1] INDIANS k32(3)
209k32(3)
Federal law may preempt

exercise of state authority over Indians; in this context, standards of preemption that have emerged in other areas of law are not appropriate.

[2] INDIANS k32(3)
209k32(3)
Concept of Indian sovereignty, which traditionally barred extension of state law to reservations, must guide determination as to whether federal law preempts exercise of state authority.

[3] INDIANS k32(3)
209k32(3)
In determining whether federal law preempts exercise of state authority over Indians, ambiguities in treaties and federal statutes are to be construed generously in light of firm federal policy of promoting tribal self-sufficiency and economic development; thus, express congressional statement preempting state's assertion of authority is not required.

[4] INDIANS k32(3)
209k32(3)
State exercise of authority over Indians may be preempted solely by reason of federal policies and interests.

[5] INDIANS k32(3)
209k32(3)
In determining whether state is preempted from exercising authority over Indians, state regulatory interests must be given great weight.

[6] INDIANS k32(2)
209k32(2)
Even on reservations, state law may be applied to Indians unless its application would interfere with tribal self-government or impair right granted or reserved by federal law.

[7] INDIANS k32(3)
209k32(3)
In determining whether federal law preempts exercise of state authority over Indians, court must make particularized inquiry into nature of state,

federal, and tribal interests at stake designed to determine whether, in specific context, exercise of state authority would violate federal law.

[8] INDIANS k32(2)
209k32(2)
State's exercise of authority over Indians may unlawfully infringe on right of reservation Indians to make their own laws and be ruled by them.

[9] INDIANS k32(2)
209k32(2)
If both tribe and state could fairly claim interest in asserting their respective jurisdictions, principles of tribal self-government were designed to resolve conflict between exercise of state authority and Indian rights by providing that state could protect its interests up to point where tribal self- government would be affected.

[10] INDIANS k32(2)
209k32(2)
Reservation activity involving only tribal members is generally exempt from state law.

[11] TAXATION k940
371k940
When state taxation of Indians is at issue, tribal interests are strongest when tax is based on value derived from on-reservation conduct involving only tribal members and where taxpayer is recipient of tribal services.

[12] TAXATION k940
371k940
State tax on Indians is generally valid when tax is directed at value generated off reservation and taxpayer is recipient of state's services.

[13] TAXATION k940
371k940
There is presumption, rather than per se rule, against state taxing authority over Indians which counsels against finding state jurisdiction to tax Indians residing on reservation or in Indian

country.

[14] TAXATION k940
371k940
Imposition of income taxes on state employee who was member of Indian tribe and resided on reservation was preempted by federal treaty which set apart reservation for use and occupation of tribe, in view of evidence that Indian was employed as therapist for Indians living on reservation and that her employment activity depended entirely on Indians' needs for mental health services. Treaty with the Navajo Indians, Art. II, 15 Stat. 667.

[15] TAXATION k940
371k940
Fact that Indian who was employed by state as Indian reservation therapist participated in administrative and training activities off reservation did not alter her employment so as to take her beyond boundaries of reservation and subject her to state income taxes.

[16] TAXATION k940
371k940
State's interest in imposing income taxes on county commissioner who was member of Indian tribe and lived on reservation was sufficient to overcome presumption against state authority to impose income taxes on Indian, where, as county commissioner, he represented citizens of entire county, where, although he was elected by constituents of district encompassing Indian reservation, his duties and policy-making power had county-wide effect, and where allowing state to tax Indian county commissioner did not create substantial burden on ability of tribal members to make their own laws and be governed by them.

[17] ADMINISTRATIVE LAW AND PROCEDURE k791
15Ak791
In reviewing Tax

Commission's order, Supreme Court grants Commission deference concerning its factual determinations, applying substantial evidence standard of review.

[17] TAXATION k1088
371k1088
In reviewing Tax Commission's order, Supreme Court grants Commission deference concerning its factual determinations, applying substantial evidence standard of review.

[18] ADMINISTRATIVE LAW AND PROCEDURE k791
15Ak791
"Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince reasonable mind to support conclusion.
See publication Words and Phrases for other judicial constructions and definitions.

[19] ADMINISTRATIVE LAW AND PROCEDURE k786
15Ak786
In reviewing Tax Commission's order, Supreme Court does not reweigh evidence but defers to Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence.

[19] ADMINISTRATIVE LAW AND PROCEDURE k791
15Ak791
In reviewing Tax Commission's order, Supreme Court does not reweigh evidence but defers to Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence.

[19] ADMINISTRATIVE LAW AND PROCEDURE k793
15Ak793
In reviewing Tax Commission's order, Supreme Court does not reweigh evidence but defers

to Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence.

[19] TAXATION k1088
371k1088
In reviewing Tax Commission's order, Supreme Court does not reweigh evidence but defers to Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence.

[20] CONSTITUTIONAL LAW k328
92k328
Requirement that taxpayers deposit deficiency of income taxes, penalties and interest prior to pursuing tax appeal did not violate their constitutional right to have open access to courts, in view of evidence that taxpayers had financial ability to pay disputed taxes, but simply found it "inconvenient" to do so. U.C.A.1953, 59-1-505.

[20] TAXATION k962
371k962
Requirement that taxpayers deposit deficiency of income taxes, penalties and interest prior to pursuing tax appeal did not violate their constitutional right to have open access to courts, in view of evidence that taxpayers had financial ability to pay disputed taxes, but simply found it "inconvenient" to do so. U.C.A.1953, 59-1-505.

***663** Bill Thomas Peters, David W. Scofield, Salt Lake City, for petitioners.

Jan Graham, Atty. Gen., Brian L. Tarbet, Asst. Atty. Gen., Salt Lake City, for respondents.

***664** Herb Yazzie, Joe Lennihan, Window Rock, for amicus Navajo Nation.

STEWART, Associate Chief Justice:

Petitioners Mark and Roselyn Maryboy appeal a decision of the Utah State Tax Commission assessing Utah income tax on their earnings as a county

commissioner and a state employee, respectively, during the years 1988 through 1990. The Maryboys also appeal the Commission's decision requiring them to pay $10,855.38 in taxes, penalties, and interest prior to pursuing this appeal.

The Maryboys are enrolled members of the Navajo Tribe and at all relevant times lived in Montezuma Creek, Utah, on the Navajo Reservation ("the Reservation"). Mr. Maryboy is employed as a San Juan County Commissioner and was elected by voters in district three of San Juan County, a political subdivision of the State of Utah. Nearly ninety-nine percent of district three lies within the Reservation. Approximately ninety percent of the voters in district three are Navajo, but not all of these Navajos live on the Reservation. Mr. Maryboy is paid by San Juan County.

During the years in question, Mr. Maryboy spent much of his time as a county commissioner working on the Reservation. Mr. Maryboy's responsibilities included coordinating with the Navajo Nation county programs dealing with such matters as public safety and natural resources; meeting with the six Navajo governmental units, known as chapters, located within district three; consulting with constituents; and performing other county commission duties. Because he speaks Navajo, Mr. Maryboy also assisted the county commissioner in district two and met with the two Navajo chapters located on the Reservation within district two boundaries.

Mr. Maryboy was also employed as the Division Director of the Utah Navajo Development Counsel (UNDC) during the years in question. As a division director, Mr.

Maryboy supervised education and teen pregnancy programs on the Reservation. Although UNDC headquarters was located off the Reservation in Bluff, Utah, Mr. Maryboy spent a large percentage of his time as a division director working on the Reservation. Mr. Maryboy was paid from UNDC funds which were derived from the Utah Navajo Trust Fund.

Mrs. Maryboy is employed by San Juan Mental Health of the Utah Department of Human Services to provide mental health services and outpatient counseling to Utah Navajos living on the Reservation. She works out of the state office located at Montezuma Creek, Utah, and also sees clients in her home. During the years in question, Mrs. Maryboy performed approximately eighty percent of her duties on the Reservation.

Mrs. Maryboy's duties off the Reservation included attending staff meetings one day a week at the main office in Blanding, Utah. She also received clinical training and updated her records there. In addition, Mrs. Maryboy worked off the Reservation at Bluff School once a month and at San Juan High School once a year.

The Commission's Auditing Division determined that all income earned by the Maryboys during the years 1988 through 1990, except Mr. Maryboy's income as a director of the UNDC, was fully taxable in Utah. The Maryboys appealed the determination, and a hearing was held before the Commission. The Commission ruled that Mrs. Maryboy's income as a state employee and Mr. Maryboy's income as a county commissioner were fully taxable to Utah. The Maryboys appealed.

On a motion for summary disposition, this Court remanded for the Commission to determine whether the Maryboys were required to pay the assessed taxes, penalties, and interest as provided by Utah Code Ann. s 59-1-505 prior to pursuing their appeal. The Commission held a formal hearing and ruled that the Maryboys were required to deposit the deficiency to pursue their appeal. The Maryboys now challenge both the Commission's determination of their Utah income tax liability and the Commission's decision that they were required to pay $10,855.38 in taxes, penalties, and interest as a condition of pursuing this appeal.

*665 I. STATE INCOME TAX

We first address the Maryboys' contention that the Commission erred in ruling that Mr. Maryboy's income from employment as a county commissioner and Mrs. Maryboy's income from her state employment is taxable. This issue presents a question of law. Accordingly, we grant the Commission no deference but apply a correction-of-error standard. Utah Code Ann. s 59-1-610(1)(b) (Supp.1994); Fatt v. Utah State Tax Comm'n, 884 P.2d 1233, 1234 (Utah 1994).

The Maryboys assert that McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), controls the issue of the taxability of their incomes. In McClanahan, the Court held that Arizona could not impose its personal income tax on "reservation Indians with income derived wholly from reservation sources." 411 U.S. at 165. The Maryboys argue that under McClanahan, Utah has no authority to tax income they earned from on-Reservation activities. The Maryboys also rely on Mescalero Apache Tribe v.

Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973), which held that the gross receipts of a tribally operated ski resort located outside the boundaries of a reservation were subject to state taxation. The Court explained that when tribal members go beyond the boundaries of the reservation, they have "generally been subject to nondiscriminatory state law otherwise applicable to all citizens of the state." Id. at 148-49, 93 S.Ct. at 1270-71. The Maryboys assert that McClanahan and Mescalero require that their income tax liability be tailored to include only that portion of their income received for activities that occurred outside the Reservation boundaries.

The Commission contends that McClanahan does not preclude taxation of the Maryboys' income because McClanahan did not deal with " 'Indians who have left ... reservations ... [but] involve[d] the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation' " (quoting McClanahan, 411 U.S. at 167-68, 93 S.Ct. at 1259-60 (citations omitted)). Citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980), the Commission argues that the validity of the tax turns on whether the imposition of the tax infringes tribal sovereignty and whether the right of the state to tax the governmentally paid salaries of the Maryboys is preempted by federal law. The Commission asserts that the tax does not interfere with tribal sovereignty, i.e., the right of the Navajo Nation to make its own laws, because the State of Utah merely seeks to tax its own elected officials and employees. The Commission also argues that the tax is not

preempted by federal law because no federal law expressly precludes states from taxing their own elected officials and employees and because Native Americans who go " 'beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state' " (quoting Mescalero, 411 U.S. at 148-49, 93 S.Ct. at 1270-71).

The United States Supreme Court has stated that "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." White Mountain, 448 U.S. at 142, 100 S.Ct. at 2583. The semi-independent status of tribes and Congress' broad power to regulate tribal affairs create "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." Id.

[1][2][3][4] First, federal law may preempt the exercise of state authority. In this context, standards of preemption that have emerged in other areas of the law are not appropriate. White Mountain, 448 U.S. at 143, 100 S.Ct. at 2583; Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 184, 109 S.Ct. 1698, 1711-12, 104 L.Ed.2d 209 (1989). "Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other." White Mountain, 448 U.S. at 143, 100 S.Ct. at 2583. The concept of Indian sovereignty, which traditionally barred the extension of state law to reservations, must guide a preemption determination. It "provides a backdrop against which the

applicable treaties and statutes must be read." McClanahan, 411 U.S. at 168, 172, 93 *666 S.Ct. at 1260, 1262; White Mountain, 448 U.S. at 143, 100 S.Ct. at 2583. Ambiguities in treaties and federal statutes are to be construed generously in light of the firm federal policy of promoting tribal self-sufficiency and economic development. White Mountain, 448 U.S. at 143-44, 100 S.Ct. at 2583-84; Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985); McClanahan, 411 U.S. at 174, 93 S.Ct. at 1263. Thus, an express congressional statement preempting a state's assertion of authority is not required; state action may be preempted solely by reason of federal policies and interests. White Mountain, 448 U.S. at 144, 100 S.Ct. at 2584.

[5][6][7] Nevertheless, state regulatory interests must also be given weight. Id.; McClanahan, 411 U.S. at 171, 93 S.Ct. at 1261-62. Even on reservations, state law may be applied unless its application would interfere with tribal self-government or impair a right granted or reserved by federal law. Mescalero, 411 U.S. at 148, 93 S.Ct. at 1270; see California v. Cabazon Band, 480 U.S. 202, 214-15, 107 S.Ct. 1083, 1091-92, 94 L.Ed.2d 244 (1987). " 'Under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and ... in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.' " Cabazon Band, 480 U.S. at 214-15, 107 S.Ct. at 1090-91 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32, 103 S.Ct. 2378, 2384-85, 76 L.Ed.2d 611 (1983)). It follows that a preemption

analysis requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain, 448 U.S. at 145, 100 S.Ct. at 2584; see Cotton Petroleum, 490 U.S. at 184, 109 S.Ct. at 1711-12; Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 837, 102 S.Ct. 3394, 3398, 73 L.Ed.2d 1174 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57, 100 S.Ct. 2069, 2082-83, 65 L.Ed.2d 10 (1980).

[8][9][10][11][12] The second barrier to the exercise of state authority is that such authority "may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' " White Mountain, 448 U.S. at 142, 100 S.Ct. at 2583 (citations omitted) (quoting Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 270-71, 3 L.Ed.2d 251 (1959)). Where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," the principles of tribal self- government were "designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." McClanahan, 411 U.S. at 179, 93 S.Ct. at 1266; see Williams, 358 U.S. at 220, 79 S.Ct. at 270-71; White Mountain, 448 U.S. at 142, 100 S.Ct. at 2583. This analysis is "grounded in notions of inherent sovereignty and in congressional policies, [and] seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."

Colville, 447 U.S. at 156, 100 S.Ct. at 2083. On this analysis, on-reservation activity involving only tribal members is generally exempt from state law. Id. at 156-67, 100 S.Ct. at 2082-88; see, e.g., McClanahan, 411 U.S. at 179-80, 93 S.Ct. at 1266-67; Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480, 96 S.Ct. at 1644-45 (1976). When state taxation is at issue, tribal interests are strongest when a tax is based on value derived from on-reservation conduct involving only tribal members and where the taxpayer is the recipient of tribal services. Colville, 447 U.S. at 156-67, 100 S.Ct. at 2082-88; see Moe, 425 U.S. at 475-81, 96 S.Ct. at 1642. On the other hand, a state tax is generally valid when the tax is directed at value generated off the reservation and the taxpayer is the recipient of a state's services. Colville, 447 U.S. at 156- 62, 100 S.Ct. at 2082-86. In those circumstances, the state interest is at its strongest and the burden on the tribe is likely to be minimal. Id.; see, e.g., Cotton Petroleum, 490 U.S. at 184-91, 109 S.Ct. at 1711-12.

While protection of the interests of tribal self-government alone can be a sufficient bar to a state's exercise of authority on the reservation, *667 it is related to the preemption analysis because the "right of tribal self- government is ultimately dependent on and subject to the broad power of Congress." White Mountain, 448 U.S. at 143, 100 S.Ct. at 2583. Thus, when assessing the validity of a state tax, the Supreme Court has generally focused on a preemption analysis with the principles of tribal self-government acting as a backdrop. For example, in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175-77, 109 S.Ct. 1698, 1706-08, 104 L.Ed.2d 209

(1989), the Court held that federal law did not preempt state oil and gas severance taxes imposed on a non-Indian lessee producing oil from on-reservation wells. In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151, 155-59, 100 S.Ct. 2069, 2071, 2082-84, 65 L.Ed.2d 10 (1980), the Court held that a state cigarette sales tax imposed on sales by tribal members to nontribal members was not preempted by a tax imposed by the tribal government. The Court explained that the state's interest in taxing nontribal member purchasers outweighed any tribal interest in preventing the tax. Id. In Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 838-43, 102 S.Ct. 3394, 3398-3401, 73 L.Ed.2d 1174 (1982), the Court held that a comprehensive federal regulatory scheme governing construction of autonomous Indian educational facilities preempted the state's authority to impose gross-receipts tax on the non-Indian contractor. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150, 100 S.Ct. 2578, 2587, 65 L.Ed.2d 665 (1980), the Court held that a use fuel tax imposed on a nontribal logging company that was working on the reservation was preempted by (1) a comprehensive federal scheme, (2) the fact that the tax burden ultimately fell on the tribe, and (3) the state's inability to justify taxes except in terms of a generalized interest in revenue. In Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 480-81, 96 S.Ct. 1634, 1644-45, 48 L.Ed.2d 96 (1976), the Court held that personal property taxes could not be applied to tribal members who resided on the reservation because the taxes conflicted with applicable federal statutes.

[13] Despite the flexible and particularized analysis reflected in the above cases, the Maryboys assert that McClanahan creates a per se rule against taxing Native Americans who reside on the reservation and derive their income from activities that take place on the reservation. We disagree. In McClanahan, the Court employed a preemption analysis to determine whether the relevant treaties and statutes allowed Arizona's exertion of authority over Mrs. McClanahan. 411 U.S. at 172-79, 93 S.Ct. at 1262-66. The Court held that they did not and that Arizona had exceeded its lawful authority by attempting to tax McClanahan. Id. at 173, 93 S.Ct. at 1263. "Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." Id. at 179-80, 93 S.Ct. at 1266-67. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 146, 93 S.Ct. 1267, 1269, 36 L.Ed.2d 114 (1973), the Court summarized the McClanahan holding: [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and [McClanahan], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent. 411 U.S. at 148, 93 S.Ct. at 1270 (citations omitted). County of Yakima v. Yakima Nation, 502 U.S. 251, 258, 112 S.Ct. 683, 688, 116 L.Ed.2d 687 (1992), also held that a state was without power to tax reservation Indians absent cession of

jurisdiction or a federal statute making congressional intention to authorize state taxation unmistakably clear. Although these cases could be construed to have erected a per se rule against state taxation in such circumstances, [FN1] the McClanahan *668 rule provides only a beginning point for our analysis because we must in addition conduct a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," see White Mountain, 448 U.S. at 145, 100 S.Ct. at 2584, to determine whether the state taxing authority can be asserted under the circumstances. Thus, as the Court has recently stated, McClanahan establishes a "presumption against state taxing authority" which "counsels against finding [state] jurisdiction" to tax Native Americans residing on the reservation or in Indian country. Oklahoma Tax Comm'n v. Sac & Fox Nation, --- U.S. ----, ---- - ----, 113 S.Ct. 1985, 1991-92, 124 L.Ed.2d 30 (1993). In Sac & Fox Nation, the Court addressed whether a tribal member who does not live on a formal reservation is exempt from state income taxes under McClanahan. The Court explained, "The residence of a tribal member is a significant component of the McClanahan presumption against state tax jurisdiction." Id. at ---- - ----, 113 S.Ct. at 1990-91. The Court held that it was enough for a tribal member to live in "Indian Country" and that the tribal member need not live on a formal reservation to be entitled to the benefit of the McClanahan presumption. Id. at ---- - ----, 113 S.Ct. at 1991-92.

FN1. In California v. Cabazon Band, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), which addressed the validity of

state regulations of on-reservation bingo games, the Court stated in a footnote, "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule." Id. at 216 n. 17, 107 S.Ct. at 1092 n. 17.

[14] In this case, the federal interests are similar to those in McClanahan. As amicus curiae Navajo Nation points out, the federal laws at issue are substantially the same. First, the Navajo Treaty of 1868 "set apart" the Reservation "for the use and occupation of the Navajo tribe." 15 Stat. 667, 668 (1868); McClanahan, 411 U.S. at 174, 93 S.Ct. at 1263. Second, the Utah Enabling Act provided that Utah would "forever disclaim all rights and title ... to all lands lying within said limits owned or held by any Indian or Indian tribes." 28 Stat. 107, 108 (1894). Citing similar language in the Arizona Enabling Act, the McClanahan Court stated that it illustrated that "Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation." McClanahan, 411 U.S. at 175, 93 S.Ct. at 1264 (citing Williams, 358 U.S. at 220-21, 79 S.Ct. at 270-71).

Many of the tribal interests involved here also are similar to those in McClanahan. The Maryboys are enrolled members of the Navajo Tribe and live on the Reservation. Accordingly, McClanahan counsels against finding state authority to tax their on-Reservation income. See Sac & Fox Nation, --- U.S. at — - ----, 113 S.Ct. at 1991-92.

Nevertheless, "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it. Nor is this a case in which an unusually large state tax

has imposed a substantial burden on the Tribe." Cotton Petroleum, 490 U.S. at 186, 109 S.Ct. at 1713. In this case, unlike McClanahan, "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions." McClanahan, 411 U.S. at 179, 93 S.Ct. at 1266. We must therefore analyze the relevant state interests involved to determine whether the state's interests overcome the McClanahan presumption against state taxing jurisdiction.

The state's interest in Mrs. Maryboy's income as a therapist for San Juan Mental Health is not sufficiently different from Arizona's interest in McClanahan to overcome the presumption. [FN2] Utah clearly has an interest in the mental health services it provides to the Navajos on the Reservation and can fairly be said to have jurisdiction over those it employs to furnish these services. However, the services the state provides are much like those provided by the private sector, and Mrs. Maryboy's employment as a therapist is not unlike a therapist's position in a private mental health clinic. Her employment activity on the Reservation depends entirely on the need or desire of Reservation Navajos for mental health services. This is a value derived from on-reservation conduct involving only tribal members. Under McClanahan, the state would be precluded from taxing this type of activity in the private sector, because it would be "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for *669 the Indians themselves." 411 U.S. at 179-80, 93 S.Ct. at 1266-67. We are unpersuaded that the state's interest in providing mental health services to the Reservation is sufficient to overcome this

presumption. We hold that the state's attempt to tax Mrs. Maryboy's income violates federal law. .

FN2. Although the Court in McClanahan did not state the nature of McClanahan's employment, counsel at oral argument asserted that she worked at the on-reservation branch of an off-reservation, nontribal bank.

[15] In addition, although Mrs. Maryboy participates in administrative and training activities off the Reservation, these activities do not alter her employment so as to take her "beyond the boundaries of the reservation" and subject her to "nondiscriminatory state law otherwise applicable to all citizens." Mescalero, 411 U.S. at 148-49, 93 S.Ct. at 1270-71. Mrs. Maryboy was hired to provide mental health services to Navajos living on the Reservation. Her administrative and training activities are merely incidental to her duty to provide counseling to Reservation Navajos. Thus, we reject the argument that her income must be apportioned on the basis of the percentage of time she spends on work activities outside the Reservation boundaries. Accordingly, we hold that the Commission erred in assessing Utah income tax on Mrs. Maryboy's income as a therapist for San Juan Mental Health.

[16] The state interests relevant to Mr. Maryboy's income as a commissioner for San Juan County present different considerations. The state's interest could not be more compelling than when it involves a publicly elected official acting in his capacity as a representative of the state and performing a state function. Whether Mr. Maryboy is working on or off the Reservation, when he is functioning as a

county commissioner he is representing the citizens of San Juan County. As county commissioner, he coordinates county programs with the tribal government, including public safety, natural resources, education, and health programs, coordinates and matches county funds with tribal programs to provide services for Navajo county residents, and participates in county administrative and policy-making decisions. All of his commissioner activities are necessarily for the benefit of San Juan County and affect the lives of the citizens of San Juan County, whether or not they are Reservation Navajos.

In addition, although he is elected by the constituents of district three, Mr. Maryboy's duties and policy-making power have county-wide effect; his votes as a county commissioner carry the same weight as the votes cast by the other two county commissioners elected to serve San Juan County. Clearly, with respect to Mr. Maryboy's income as a county commissioner, the state has a paramount interest in the activity it seeks to tax quite apart from its general interest in raising revenues; "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." Cotton Petroleum, 490 U.S. at 186, 109 S.Ct. at 1713.

Likewise, allowing the state to tax elected officials of state subdivisions who work on the Reservation does not create a substantial burden on the ability of tribal members to make their own laws and be governed by them. Although Mr. Maryboy is an enrolled member of the Navajo tribe and lives on the Reservation, his income is not derived from "value generated on the

reservation." Colville, 447 U.S. at 156-57, 100 S.Ct. at 2082-83. When he is working as a county commissioner on the Reservation, he is still functioning in a county capacity and receiving the benefits derived from citizen participation in state government. That he spends time on the Reservation in his official county commissioner capacity does not diminish the distinct nature of his employment; Mr. Maryboy does not lose his status and powers to function as a county commissioner when he steps onto the Reservation.

The Navajo Nation asserts that allowing the state to impose this tax nullifies the tribe's prerogative not to impose an income tax on its tribal members and thus infringes on tribal self-government. However, the tax does not interfere with the tribe's power to impose its own income tax; each government may impose, or not impose, its tax without ousting the other. Colville, 447 U.S. at 158, 100 S.Ct. at 2083-84; Cotton Petroleum, 490 U.S. at 188, 109 S.Ct. at 1713-14. In addition, Native Americans going beyond the boundaries of the reservation have "generally been subject to nondiscriminatory state law otherwise applicable to all citizens of the State" absent express federal law to the contrary. *670 Mescalero, 411 U.S. at 148-49, 93 S.Ct. at 1270. Mr. Maryboy's employment as a publicly elected official in the State of Utah is necessarily beyond the Reservation boundaries and tribal self-government. As such, it is subject to the same nondiscriminatory tax laws otherwise applicable to citizens of Utah. See Colville, 447 U.S. at 151, 169, 100 S.Ct. at 2080, 2089.

We hold that the state interests involved overcome

the McClanahan presumption against finding state authority and that state taxation of Mr. Maryboy's income as a county commissioner does not violate federal law. Accordingly, we affirm the Commission's ruling that Mr. Maryboy's entire income as a county commissioner is subject to Utah income tax. We reverse the Commission's ruling that Mrs. Maryboy's income as an employee of San Juan Mental Health is taxable in Utah.

II. PAYMENT OF DEFICIENCY

The Maryboys assert that the Commission's order requiring them, pursuant to Utah Code Ann. s 59-1-505, [FN3] to deposit the deficiency of income taxes, penalties, and interest prior to pursuing this appeal violated their constitutional right to have open access to the courts of this state. They assert that the uncontradicted evidence presented at the hearing on limited remand demonstrated that they did not have sufficient liquid assets available to pay the deficiency and that virtually all of their discretionary income would be spent in loan payments if they obtained a loan to pay the deficiency. Thus, they contend that, under Jensen v. State Tax Commission, 835 P.2d 965, 969 (Utah 1992), the Commission should have allowed them to seek judicial review without paying the deficiency. We disagree.

FN3. Section 59-1-505 provides, "A taxpayer who, after receiving a final decision from the commission in accordance with the other provisions of this part, desires to seek judicial review of that decision shall deposit the full amount of the taxes, interest, and penalties with the commission."

[17][18][19] In reviewing the Commission's order, we

grant the Commission deference concerning its factual determinations, "applying a substantial evidence standard of review." Utah Code Ann. s 59-1-610(1)(a)(Supp.1994); see Kennecott Corp. v. Utah State Tax Comm'n, 858 P.2d 1381, 1385 (Utah 1993). Substantial evidence is " 'that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.' " Utah Assoc. of Counties v. Tax Comm'n ex rel. Am. Tel. & Tel. Co., 895 P.2d 819, 821 (Utah 1995) (quoting U.S. West Communications v. Public Serv. Comm'n, 882 P.2d 141, 146 (Utah 1993)). We do not reweigh the evidence but defer to the Commission to resolve issues involving conflicting views if its findings are supported by substantial evidence. See Utah Assoc. of Counties, 895 P.2d at 821.

[20] Our review of the record reveals substantial evidence to support the Commission's findings on limited remand. The Commission found that the Maryboys "had a combined income in 1992 of over $77,000." The Commission also found, "In addition to owning savings bonds and maintaining a pension plan worth $47,000, [the Maryboys] own two residences and two relatively new vehicles." On the basis of that evidence, the Commission determined that the Maryboys had the ability to pay the deficiency, but found it inconvenient to do so.

Relying on Jensen, the Commission found that the inconvenience the Maryboys would suffer in procuring the $10,855.38 deficiency was not sufficient to deny them reasonable access to judicial review. We agree. In Jensen, this Court addressed whether s 59-1-505 violates the open

courts provision, article I, section 11 of the Utah Constitution. [FN4] The petitioners in Jensen had been assessed a deficiency of $344,419 in income taxes, penalties, and interest. They were unable to *671 comply with s 59-1-505, and thus strict application of that section precluded judicial review of the Commission's final order. We stated that "to the extent s 59-1-505 precludes reasonable access to judicial review, it violates the open courts provision" and held, as applied to the facts of that case, that it was an effective bar to judicial review and was unconstitutional as applied. Jensen, 835 P.2d at 969.

FN4. Article I, section 11 of the Utah Constitution states: All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Unlike the petitioners in Jensen, the Maryboys were financially able to pay the $10,855.38 deficiency. Although the requirement in s 59-1-505 inconvenienced them, it did not deny them reasonable access to judicial review. As we made clear in Jensen, s 59-1-505 "is not unconstitutional in all cases. When a taxpayer is able to meet the requirement, the deposit must be paid." 835 P.2d at 969. This is just such a case.

Affirmed in part; reversed in part.

ZIMMERMAN, C.J., and DURHAM and RUSSON, JJ., concur.

HOWE, Justice, concurring and dissenting:

I concur except as to that part of the opinion dealing with the income of Mrs. Maryboy from state employment. As to that part, I dissent.
END OF DOCUMENT

BEFORE THE UTAH STATE TAX COMMISSION

MARK & ROSELYN MARYBOY,	)	
Petitioners,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION
v.	)	
AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,	)	Appeal No. 92-1045
Respondent.	)	Account No. 585-76-5012

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on November 12, 1992. Tax Commissioners Joe B. Pacheco and S. Blaine Willes heard the matter. Lisa L. Olpin, Administrative Law Judge presided. Present and representing Petitioners was Russell Kearl, an attorney. Present and representing Respondent was Brian Tarbet, Assistant Utah Attorney General.

Prior to the introduction of testimony at the hearing, Petitioners made a motion to limit the scope of the hearing to Mark Maryboy's income earned as a San Juan County Commissioner and his wife's income earned as a

state employee. Petitioners offered to accept a compromise earlier discussed with the Auditing Division regarding the taxation of Mark Maryboy's income earned as a division director at the Utah Navajo Development Counsel.

The Auditing Division responded, however, that the compromise was no longer viable as the entire matter was now before the Tax Commission as evidenced in Petitioners' petition for redetermination. Respondent had since then altered its stance and at the time of the hearing was seeking 100% taxation of all of Petitioners' incomes.

The Commission denied Petitioners' motion to limit the scope of the hearing.

Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is personal income tax.
2. The years in question are 1988 through 1990.
3. Petitioners were at all times enrolled members of the Navajo tribe.
4. During the period in question, Petitioners lived in Montezuma Creek, Utah. Their home is located on the Navajo Indian Reservation.

5. The Montezuma Creek area consists of tribal land, Bureau of Land Management land, private land and public land.

6. During the years in question, Roselyn Maryboy was a paid Utah state employee working at Utah State Mental Services. She had been so employed since 1980 as a clinician, providing outpatient counseling among other services, to Utah Navajos located on the reservation.

7. Ms. Maryboy speaks Navajo.

8. As a state employee, Ms. Maryboy worked out of the state office located at Montezuma Creek. She was uncertain if the office is located on the reservation.

9. One day per week Ms. Maryboy attends a staff meeting at the main office in Blanding, Utah located off of the reservation. There she obtains more clinical training and updates her records. She leaves Blanding between 2:00 and 3:00 p.m. and returns to her duties in Montezuma Creek.

10. In addition to traveling to Blanding weekly, Ms. Maryboy also works off of the reservation once a month when she visits Bluff School. Once a year she is a guest

speaker at San Juan High School located off of the reservation.

11. During the years in question, Ms. Maryboy was assigned to Navajo Indian Reservation cases only.

12. Typically, Ms. Maryboy spends one to two hours per day in the Montezuma Creek office and the remainder of her time on the reservation. Some days she is never in the office as she is on the reservation.

13. While she is paid for eight hour days, Ms. Maryboy occasionally sees clients in her home. She works as if she is on-call twenty-four hours a day.

14. While Ms. Maryboy spends time in the Montezuma Creek office, approximately 80% of her duties are performed out of the office and on the reservation.

15. Mark Maryboy was employed as a San Juan County Commissioner and as a Division Director of the Utah Navajo Development Council (U.N.D.C.) during the years in question.

16. As a county commissioner elected by and representing District Three of San Juan County, Mr. Maryboy is paid by San Juan County.

17. Nearly 99% of District Three is comprised of the Navajo Indian Reservation. The communities of Bluff and Mexican Hat are within District Three, but are not located on the reservation.

18. Approximately ninety percent of the constituents in District Three are Navajos; however, not all of these Navajos actually live on the reservation.

19. As a county commissioner, Mr. Maryboy travels weekly to Monticello, Utah located off of the reservation. There Mr. Maryboy spends eight hours in Monticello preparing for and attendng a county council meeting. In addition to participatingin countywide issues, Mr. Maryboy represents to the county council the concerns of District Three.

20. Initially, Mr. Mayboy was assigned to the library and recreation boards. When he learned that the Navajo people did not participae in these programs, he was reassigned to handle Navajo reservation programs. Primarily, Mr. Maryboy coordinates county programs, such as public safety and natural resources with the Navajo Nation.

21. Typically, Mr. Maryboy meets twice a month with the six individual, local Navajo governments (known as chapters) located on the reservation within District Three.

22. Since he speaks Navajo, Mr. Maryboy would also help out in District Two and meet with the two chapters located on the Navajo Reservation within its boundaries.

23. Aside from the weekly council meeting in Monticello, Mr. Maryboy travels to Salt Lake once a month on county commission business. He also spends time in Salt Lake when the state legislature is in session. Once a year Mr. Maryboy goes to a nationwide meeting for county commissioners.

24. When Mr. Maryboy is not attending meetings outside of his district, he spends the remainder of his time consulting with his constituents. With the exception of two yearly meetings in Bluff, Mr. Maryboy is on the reservation performing county commission duties. Mr. Maryboy often works in Window Rock, Arizona at tribal headquarters.

25. For the period in question, Mr. Maryboy spent 75% of his time per year as a county commissioner

working on the Navajo reservation.

26. While employed by San Juan County, Mr. Maryboy also had a second job as a director of the U.N.D.C. Mr. Maryboy was paid from U.N.D.C. funds which are derived from the Utah Navajo Trust Fund.

27. This trust fund is the result of an Act of Congress, granting federal monies and royalties to the Navajo Nation, a portion of which the state of Utah holds in trust.

28. As the U.N.D.C. division director, Mr. Maryboy supervised education and teen pregnancy programs on the reservation.

29. He worked four days per week, eight hours per day in this capacity.

30. Although U.N.D.C. headquarters were located off the reservation in Bluff, Mr. Maryboy spent the majority of his time on the reservation.

31. On a yearly basis Mr. Maryboy spent 75% of his time as division director at the U.N.D.C. on the reservation.

32. The Auditing Division contends that 100% of Roselyn Maryboy's income earned as a state of Utah

employee is taxable to Utah. Respondent also claims that 100% of both of Mark Maryboy's incomes as a San Juan County Commissioner and U.N.D.C. Division Director are taxable to Utah.

33. Respondent argues that these incomes are taxable since they were earned from off reservation sources, i.e., the state of Utah, San Juan County and the U.N.D.C.

34. Petitioners assert that the percentage of income earned while working on the reservation is not taxable. In this case, Petitioners argue that only 20% of Roselyn Maryboy's income, 25% of Mary Maryboy's income as a county commissioner and 25% of his income as U.N.D.C. division director are taxable for each of the years in question.

CONCLUSIONS OF LAW

Due to the unique relationship existing between the Indian tribes and the U. S. Government, the states are cautious to in any way encroach upon the broad power Congress has granted itself to regulate tribal affairs.

Before a state may exercise authority over an Indian reservation or its tribal members, it must first determine

whether or not its assertion of power is pre-empted by federal law. Secondly, it must ascertain whether or not the state is infringing upon the right of reservation Indians to make their own laws and to be ruled by them. If federal pre-emption exists or there is an infringement on the Indian right to self-government that outweighs any state interest, the state's exercise of authority is unlawful.

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging self-government is at its strongest. White Mountain Apache v. Bracker, 448 U.S. 136, 144 (1980). In the case of Indians going beyond reservation boundaries, however, a nondiscriminatory state law is generally applicable in the absence of express federal law to the contrary. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

Federal pre-emption is usually found if after an inquiry into the nature of the state, federal and tribal interests it is determined that the state authority would violate federal law or policy. An express congressional statement or law

is not required in order to find pre-emption.

DECISION AND ORDER

The fact pattern as presented in the case before the Tax Commission appears to be one of first impression. The circumstances involved are not on-point with situations described in precedent cases. This is not a case where the state attempts to tax a reservation Indian for income earned exclusively on the reservation as discussed in McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973).

Venturing into a previously untrodden arena, the Tax Commission holds that the total income of Roselyn Maryboy, a state employee, is taxable to Utah. Likewise, the Commission finds that the total income of Mark Maryboy as county commissioner is taxable to Utah.

Petitioners are salaried with off-reservation funds and enjoy benefits of state and county employment. As a state employee and county commissioner, Petitioners have taken positions with entities off the reservation, subjecting themselves to state jurisdiction and consequently, state taxation of their incomes.

Based upon the facts presented, the Tax Commission expressly rejects Petitioners' proposition that the location of where the work is performed, in this case on the reservation to a large degree, dictates the extent the state and/or county can tax its own employees.

Turning to Mark Maryboy's income earned as director of the Utah Navajo Development Council, the Tax Commission finds that this income is not taxable to Utah on the grounds of federal pre-emption.

As U.N.D.C. director, Mr. Maryboy was salaried by funds allocated through an act of Congress. This trust fund was explicitly created for the welfare of the Indian people to help them in their quest for self-government. As such, the state cannot infringe upon this right by taxing a tribal member's income derived from the trust fund.

Based upon the foregoing, the Tax Commission holds that Roselyn Maryboy's income as a paid state employee and Mark Maryboy's income as a county commissioner are fully taxable to Utah for the years 1988 through 1990. Mr. Maryboy's income earned as director of the Utah Development Council, however, is not taxable for the time period.

It is so ordered.

DATED this 12th day of March, 1993.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

/s/ R. H. Hansen
R. H. Hansen
Chairman

ASSENT

Roger O. Tew
Commissioner

/s/ Joe B. Pacheco
Commissioner

/s/ S. Blaine Willes
Commissioner

NOTICE: You have twenty (20) days after the date of the final order to file a request for reconsideration or thirty (30) days after the date of final order to file in Supreme Court a petition for judicial review. Utah Code Ann. §§63-46b-13(1), 63-46b-14(2)(a).

Appeal No. 92-0145

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Decision to the following:

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DATED this 12th day of March, 1993.

/s/ Sara Jenson
Secretary